

SUZANA MD ARIS

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v.

DSP ISHAK HUSSAIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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KANG HWEE GEE J

[SUMMONS NO: S1-21-61-2000]

20 OCTOBER 2009

TORT: *Negligence - Duty of care - Police - Death of detainee in a police lock-up - Whether police failed to take reasonable care of detainee while he was in their custody - Whether police liable in negligence for his death - Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 3, 4 - Criminal Procedure Code, s. 117*

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POLICE: *Tortious liabilities - Negligence - Duty of care, whether breached - Death of detainee in a police lock-up - Whether police failed to take reasonable care of detainee while he was in their custody - Whether police liable in negligence for his death - Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 3, 4 - Criminal Procedure Code, s. 117*

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CIVIL PROCEDURE: *Parties - Joinder - Action in negligence by plaintiff against four defendants - Whether action against 1st and 2nd defendants must fail - Whether only action against 3rd and 4th defendants should be allowed to stand*

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The plaintiff in this action was suing in her capacity as the wife and administrator of the estate of her husband ('the deceased'), who died while being detained under s. 117 of the Criminal Procedure Code in a police lock-up. The plaintiff's claim was based on negligence *ie*, that the defendants had failed to observe the requisite duty of care in detaining the deceased. The defendants denied that they were negligent in causing the deceased's death in the lock-up, in essence claiming that the deceased was arrested pursuant to s. 3 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('Act') and lawfully remanded for 14 days by the Magistrates' Court under s. 4 of the Act.

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Held (allowing the plaintiff's claim against the 3rd and 4th defendants with costs):

- (1) The plaintiff's claim was essentially against the Police diRaja Malaysia although she had incorrectly cited various police personnel as defendants. Since no evidence with respect to the

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- A culpability of the 1st and 2nd defendants as parties in causing the deceased's death was offered, the plaintiff's action against them must fail. The claim against the 3rd defendant, the head of the Polis diRaja Malaysia, and the 4th defendant, his employer, should be allowed to stand. (paras 20-22)
- B (2) The evidence clearly showed that the deceased had been lawfully arrested, produced before the Magistrate within 24 hours of his initial arrest and ordered by said Magistrate to be detained for 14 days pursuant to the Act. There was absolutely no proof
- C that the deceased had been assaulted or improperly handled from the time he was brought into the lock-up until the time he was found dead. The post-mortem report itself did not show that he was assaulted. However, the absence of assault or mistreatment did not exonerate the defendants from liability.
- D Having taken the deceased lawfully into their custody, it was incumbent upon the police to ensure that the deceased's health and well-being were taken care of. The evidence, however, indicated that the defendants had breached that duty of care. The deceased died of a massive pleural effusion secondary to bronchopneumonia. This was not a terminal disease and had
- E the police acted responsibly and sent the deceased to the hospital earlier, he could have been treated and saved. It was reasonably foreseeable that a failure to properly and adequately attend to the deceased's condition would result in serious injury
- F to his health. The fact that the deceased had been suffering from tuberculosis before he was taken into custody would not exonerate the defendants from liability as, under the egg-shell skull principle, they would have to take their victim as they find him. Therefore, the police were negligent in having failed to
- G take reasonable care of the deceased while he was in their custody and were, thus, liable in negligence for his death. (paras 23-30)

[Damages to be assessed by Registrar.]

H Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA (*refd*)

Azizi Amran v. Hizzam Che Hassan [2006] 2 CLJ 821 CA (*refd*)

Caparo Industries plc v. Dickman & Ors [1990] 1 All ER 568 (*refd*)

I Legislation referred to:

Criminal Procedure Code, s. 117

Drug Dependents (Treatment And Rehabilitation) Act 1983, ss. 3, 4(1)(b)

For the plaintiff - U Kumar; M/s Kumar Hashimah & Co

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For the defendants - Amarjeet Singh SFC (Rosli Ahmad, Wan Roslan, Nadia Tajuddin SSFC with him); AG's Chambers

Reported by Suresh Nathan

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JUDGMENT

Kang Hwee Gee J:

[1] The plaintiff sues in her capacity as the wife and administrator of the estate of her husband, Mohd Anuar bin Sharip who died while being detained under s. 117 of the Criminal Procedure Code at the police lock-up in Rawang.

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[2] The 1st defendant DSP Ishak bin Hussain the Ketua Bahagian Siasatan Jenayah, Daerah Gombak, the 2nd defendant ACP Massari bin Hashim, the Ketua Polis Daerah Jenayah, Gombak, Selangor and the 3rd defendant Tan Sri Norian Mai, the Ketua Polis Negara were sued in their personal capacity. No mention was however made in the statement of claim with respect to the role that each defendant played causing the death of the deceased save that they were at the material time holding their respective post in the Polis diRaja Malaysia.

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[3] The 4th defendant is the Government of Malaysia, employer of the 1st, 2nd and 3rd defendants.

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[4] The said Mohd Anuar bin Sharip was arrested on 10 August 1999 at his house on suspicion of being a drug addict under s. 3 of the Drug Dependents (Treatment And Rehabilitation) Act 1983. He was brought to the Balai Polis Selayang and on the next day produced before the Rawang Magistrate who remanded him for a period of 14 days (from 11 August 1999 to 15 August 1999) pending the result of his urine test to determine the presence of dangerous drugs.

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[5] On 16 August 1999, he vomited blood while under detention in his cell. He informed Sarjan 69632 Mohd Noor bin Ali (DW8) the 'penyelia' lock-up who in turn informed the operation officer, Inspector Owi Cheang Ian through the phone, who directed the deceased to be brought to the clinic. On the same day according to defence witness DW7 D/Kopral 98010 Sulaiman bin Abu Bakar, he

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- A brought the deceased to the Klinik Kesihatan Rawang to be attended to but could not remember to whom. The deceased was subsequently brought back to his cell at the police station.
- B [6] Two days later on 18 August 1999, the deceased complained to Kopral 86369 Mohd Nor bin Hussin (DW6) another 'penyelia' then on duty, of stomach ache. He was then brought to the same Klinik Kesihatan Rawang and was attended to by the Pembantu Perubatan Murugaian a/l Vedankan (DW5). He was examined by Mr. Murugaian, before whom he had complained of having stomach
- C ache and loss of appetite. He was examined and was given some gastric pills. He was asked to rest for about 10 minutes to see the reaction of the medication. He was then brought back to the lock-up when he felt better.
- D [7] A day later on 19 August 1999 at about 1.30am Mohd Nor bin Hussin (DW6) was informed that the deceased was unconscious in his cell. When he went over to investigate, he found the deceased already dead. A report was subsequently lodged of the death.
- E [8] A doctor from Hospital Kuala Kubu Bharu, Dr. Syed Mohd Redha bin Syed Nasir (DW1) was summoned to attend to the deceased. He arrived at the cell later in the morning and confirmed the death of the deceased.
- F [9] In so far as it can be understood from para. 26 of the statement of claim the plaintiff's claim is based on negligence in the execution of their duty in detaining the deceased Mohd Anuar bin Sharip.
- G [10] Various particulars of negligence were pleaded as follows:
- H a) Defendan-Defendan dan/atau Agen/Pengkhidmat/Penggaji/Pekerja mereka melampaui tugas-tugas sah disisi undang-undang dan/atau Akta Polis 1967;
- I b) Defendan-Defendan dan/atau Agen/Pengkhidmat/Penggaji mereka melampaui Peraturan-Peraturan Am;
- c) Defendan-Defendan dan/atau Agen/Pengkhidmat/Penggaji mereka terkeluar daripada tugas-tugas dan arahan-arahan yang sah dan berpatutan;
- d) Defendan-Defendan dan/atau Agen/Pengkhidmat/Penggaji mereka bertindak secara tidak munasabah dan berpatutan;

- e) Defendan-Defenda dan/atau Agen/Pengkhidmat/Penggaji mereka gagal mengenalkan diri mereka kepada Plaintiff dan atau anggota keluarga Plaintiff; A
- f) Defendan-Defendan dan/atau Agen/Pengkhidmat/Penggaji mereka bertindak tanpa “valid or legal power to act”; B
- g) Defendan-Defendan dan/atau Agen/Pengkhidmat/Penggaji mereka telah “breached the laws of natural justice”; B
- h) Defendan-Defendan dan/atau Agen/Pengkhidmat/Penggaji mereka telah tidak menjalankan tugas secara bertanggungjawab, munasabah dan berpatutan. C

[11] Although the particulars of defendants’ negligence in respect of the defendants’ failure to observe the requisite duty of care do not appear to be sufficiently pleaded, this issue was raised by the plaintiff and replied to by the defendants in the trial. D

[12] The defendants denied that they were negligent in causing the death of Mohd Anuar bin Sharip in the lock-up. In essence they claimed that Mohd Anuar bin Sharip was arrested pursuant to s. 3 of the Drug Dependents (Treatment And Rehabilitation) Act 1983 and had been lawfully remanded for 14 days by the Rawang Magistrate Court under s. 4 of the Act. E

The Trial

[13] Much time was wasted by the insistence of counsel for the plaintiff to cross-examine on the line that the police at Rawang had assaulted the deceased while he was in remand at the lock-up causing his death. F

[14] The cross-examination centered on the original post-mortem report dated 17 November 1999 (agreed bundle p. 55) of the medical officer Dr. Lee Tiong See (DW16) which stated in item (iii) on External Examination of the body of the deceased as “Multiple laceration lesion over the Neck, Chest, Abdomen and Back region ranging 1cm to 2cm” which the plaintiff construed as evidence of injury inflicted by the police while the deceased was in custody. G
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[15] The plaintiff called a thoracic physician Dr. Michael Jeyakumar Devaraj (PW5) who testified that there could not have been a typing error as the word “taenea” is a skin fungus disease whereas “laceration” suggests wound on the skin. I

- A [16] But the evidence of Dr. Lee Tiong See is clear. He testified that the words “laceration lesion” were wrongly typed by the hospital clerk from his original handwritten post mortem report p. 61 agreed bundle. It should have read “Taenia lesions” instead of “laceration lesion”. He had accordingly later had the post mortem report retyped dated 29 May 2000 to show “Taenia lesions”. (Agreed bundle p. 58).
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The Law

- C [17] See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors.* [2003] 1 CLJ 585.

[18] To sustain an action in negligence, the plaintiff must prove:

- i. That a duty of care was owed to him by the defendant;
- D ii. That there was a breach of the duty of care; and
- iii. That in consequence thereof he suffered damages.

- E [19] See also *Caparo Industries plc v. Dickman & Ors.* [1990] 1 All ER 568 as approved and applied in *Arab-Malaysian Finance Bhd, supra*:

- F The 3 criteria for imposition of duty of care were foreseeability of damage, proximity of relationship and reasonableness or otherwise of imposing a duty. In determining whether there was a relationship between the parties, the court guided by situation in which the existence, scope and limit of a duty of care had previously been held to exist rather than by a single general principle would determine whether the particular damage suffered was the kind of damage which the defendant was under the duty to prevent and whether there were circumstances from which the court could pragmatically conclude that the duty existed.
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Finding On The Joinder Of The Defendants

- H [20] The plaintiff’s claim in so far as it can be understood is essentially against the Police diRaja Malaysia although she had incorrectly cited various police personnel as defendants.

- I [21] No evidence with respect to the culpability of the 1st and 2nd defendants as parties in causing the death of the deceased was offered. Accordingly the plaintiff’s action on the 1st and 2nd defendants must fail and be dismissed with costs.

[22] The claim against the 3rd defendant should be allowed to stand as the head of the Polis DiRaja Malaysia. So is the claim against the 4th defendant as his employer.

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Finding On The Plaintiff's Claim

[23] The evidence clearly shows that the deceased was lawfully arrested pursuant to s. 3 of the Drug Dependents (Treatment And Rehabilitation) Act 1983. This is clear from the evidence of the arresting officer Lans Kopral 116138 Mohd Basri bin Mohd Noor, (DW9) clearly indicates that the deceased was arrested in his house on suspicion of being a drug addict. He was awoken from his sleep and found to be dreamy which justified his arrest on reasonable suspicion that he was a drug addict and he was informed of the reason for his arrest. He was lawfully taken to the Balai Polis Selayang where his urine sample was taken for testing. He was produced before the Magistrate within 24 hours of his initial arrest and was ordered by the Magistrate to be detained for 14 days pursuant to s. 4(1)(b) of the Drug Dependents (Treatment And Rehabilitation) Act 1983.

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[24] There is absolutely no proof that the said detainee Mohd Anuar bin Sharip had been assaulted or improperly handled from the time he was brought into the lock-up until the time he was found dead. The post mortem report itself did not show that he was assaulted. The post-mortem report of Dr. Lee Tiong See clearly shows that no injury, fracture or bruises were seen on the deceased. The marks as seen in photograph exh. P2D were confirmed by the forensic pathologist Dr. Ab. Halim bin Hj. Mansar (DW17) from the same photograph as "The marks I saw in exh. P2D are indicative of the deceased being a drug user by hypodermic needle. I ruled out trauma on this part of the body as they were punctured marks which can cause blue black colour based on the report of the doctor conducting the post mortem."

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[25] An absence of evidence of assault or mistreatment however does not exonerate the defendants from liability. As a detainee the deceased would not be free to have himself medically attended to as he would a free man. Having taken the deceased lawfully under its custody his well-being was in the hands of the police for as a detainee he would not be in a position to have himself medically attended to as he would a free man. The police therefore owed him

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A a duty of care to ensure that appropriate medical care would be extended to him during the period he was in its custody within the criteria set in *Caparo Industries plc v. Dickman & Ors, supra*.

B [26] I accept the evidence of Dr. Lee Tiong See who did the post mortem that in all probabilities the deceased died of massive pleural effusion secondary to bronchopneumonia. Dr. Lee Tiong See agreed with the findings of Dr. Michael Devaraj Jeyakumar, the thoracic physician called by the plaintiff that the deceased had severe lung infection for at least 2-3 months before his death. The lung infection arose from ‘caseous necrosis’ that is to say the presence of tuberculosis.

D [27] I also accept the evidence of Dr. Michael Devaraj Jeyakumar that pleural effusion secondary to bronchopneumonia is not a terminal disease and had the police acted responsibly and had sent the deceased to hospital earlier he could have been treated and saved. (See soalan 2 and soalan 3 of his witness statement.)

E [28] The evidence shows that the defendants were in breach of that duty. Having taken the deceased into their custody it was incumbent upon the police to ensure that the health and well-being of the deceased were taken care of. Whether or not he was being brought at all to the Pusat Kesihatan Rawang to be attended to by the hospital assistant was doubtful as the person who brought him there D/Kopral 98010 Sulaiman bin Abu Bakar (DW7) could not remember which hospital assistant attended to the deceased. In any case even if he had in fact been brought to see a hospital assistant this would not have been enough to discharge that duty considering the seriousness of the deceased’s condition. It was reasonably foreseeable that a failure to properly and adequately attend to the deceased’s serious condition would result in serious injury to his health. His later complaint of stomach ache and loss of appetite after the first episode underscores the failure on the part of the police to discharge that duty of care.

H [29] The fact that the deceased had been suffering from tuberculosis before he was taken into custody would not exonerate the defendants from liability as they would have to “take their victim as they find him under the egg-shell skull principle”. (See *Azizi Amran v. Hizzam Che Hassan* [2006] 2 CLJ 821 paras. 8 and 9.)

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[30] I am therefore convinced that the police were negligent in having failed to take reasonable care of the deceased while in its custody and should therefore be liable in negligence for the death of the deceased. Accordingly I allow the plaintiff's claim against the 3rd and 4th defendants with costs.

[31] As agreed loss and damages are to be assessed by the Registrar.

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